Supreme Court, U.S.
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No. 03-353

IN THE

Supreme Court of the United States

LON C. SAUER, Individually, and as Administrator of the Estate of MARGARETHA SAUER,

Cross-Petitioner,

v.

ADVOCAT, INC., DIVERSICARE LEASING CORPORATION, d/b/a RICH MOUNTAIN NURSING AND REHABILITATION CENTER, and DIVERSICARE MANAGEMENT SERVICES COMPANY,

Cross-Respondents.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING AND DESIGNATION OF CORPORATE RELATIONSHIP

Cross-Respondent Advocat, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock. Advocat, Inc., is the parent company and sole shareholder of both Cross-Respondent Diversicare Leasing Corporation, d/b/a/ Rich Mountain Nursing and Rehabilitation Center, and Cross-Respondent Diversicare Management Services Company.

Cross-Petitioner Lon C. Sauer is an individual and administrator of the Estate of Margaretha Sauer, deceased.

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STATEMENT OF THE CASE

Petitioners-Cross-Respondents Advocat, Inc., Diversicare Leasing Corporation, and Diversicare Management Services Company ("defendants") respectfully refer the Court to the Statement of Case in their Petition for a Writ of Certiorari, which is incorporated herein by reference. Pursuant to Supreme Court Rule 15.2, a brief in opposition to a petition or cross-petition for a writ of certiorari "should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted." U.S. Sup. Ct. R. 15.2. In the Conditional Cross-Petition for a Writ of Certiorari, Cross-Petitioner ("Plaintiff") makes numerous factual misstatements. Plaintiff's misstatements of fact do not relate to the legal issues raised in Plaintiff's cross-petition, which defendants address in the Argument section below. However, given the requirements of Rule 15.2, defendants include the following supplemental statement of the case.

Throughout the cross-petition, Plaintiff incorrectly portrays the three separate defendant corporations, Diversicare Leasing Corporation ("Diversicare Leasing"), Diversicare Management Services Company ("Diversicare Management"), and Advocat, Inc. ("Advocat"), as one and the same. Plaintiff asserts that "[a]ll three of the Advocat Defendants participated in the management and direction" of the Rich Mountain nursing home, where Mrs. Sauer resided. Cross-Pet. at 4.

Plaintiff cannot effect a "merger" of the three defendants by rhetorically substituting the collective term "Advocat Defendants" for the name of each company. Plaintiff does not dispute the fact that the jury that determined the amount of the punitive damages awards was charged to consider each of the three defendants separately. *See* Pet. App. 155a (trial court instructed the jury to decide "each defendant's case separately as if it were a separate lawsuit"). Moreover, in opposing defendants' motion for remittitur, Plaintiff expressly stated to the trial court that Plaintiff "never argued an alter ego theory with respect to any Defendant" but had tried "a case of direct liability against each corporation and the jury was instructed as such." Pet. App. 83a. Plaintiff also denied that it had "asked the jury to pierce the corporate veil and hold Advocat liable for the actions of its subsidiaries." Pet. App. 83a-84a. Furthermore, the trial court recognized that defendants were

separate corporate entities. Pet. at 6 n.3.

The evidence at trial established that the three defendants had vastly different roles. Diversicare Leasing owned and operated the Rich Mountain nursing home. Diversicare Management was involved in the nursing home's daily operations only by virtue of the fact that Rich Mountain's administrator, who was not part of the nursing staff, was an employee of Diversicare Management. No other employee of Diversicare Management participated in the daily operations of the nursing home. All of the individuals at the nursing home who took care of Mrs. Sauer were employees of Diversicare Leasing and were supervised by another Diversicare Leasing employee, the Director of Nursing.

Advocat is a public company whose subsidiaries own and operate nursing homes and other health care facilities across the country. Its subsidiaries include Diversicare Leasing and Diversicare Management. (R. 3681-82) There was no evidence that Advocat participated in the day-to-day operations of the Rich Mountain nursing home. Advocat's Board of Directors approved the budgets for Rich Mountain, along with the budgets of a large number of other nursing homes owned by Advocat subsidiaries across the country. The Advocat board had final budgetary approval for all of the nursing homes only on a consolidated basis. (R. 3665) The Advocat board "did not get into the individual specifics of a particular nursing home," and it did not see the budget for the Rich Mountain nursing home "other than a very summary one-page spread sheet that had all of Arkansas on it, and then each individual nursing home in Arkansas consolidated over in one column." (R. 3665-66) There was no evidence that in the budgeting process the Advocat board received information regarding alleged short-staffing at Rich Mountain. Plaintiff's witness, Mark Hemingway, a former divisional vice-president for Diversicare Management, testified that the budgets were prepared in order to maintain staffing levels that met or exceeded state staffing requirements. (R. 3892-93)

In short, this case was tried below against the defendants as three distinct corporate entities, and the evidence established that the conduct and roles of the defendants differed significantly.

Plaintiff also gives a very one-sided and exaggerated description of the evidence regarding Mrs. Sauer's care at Rich Mountain. Defendants will not rehearse the countervailing evidence regarding Mrs. Sauer's care or point out specific misstatements made by Plaintiff. The details of Mrs. Sauer's care are not relevant to the legal and constitutional issues raised by Plaintiff's cross-petition. Nor does Plaintiff's inflammatory rendition of the evidence regarding Mrs. Sauer's care affect the constitutional issues at the heart of defendants' petition for certiorari.

SUMMARY OF ARGUMENT

Plaintiff's conditional cross-petition seeks to challenge the Arkansas Supreme Court's reduction of the jury's $63 million punitive damages awards to $21 million. Plaintiff claims that the Arkansas Supreme Court's reduction of the punitive damages awards was based upon the court's purportedly erroneous statement that "equal weight" should be given to each of the constitutional guideposts set forth in this Court's decisions in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 123 S. Ct. 1513 (2003).

Plaintiff's cross-petition should be denied because the Arkansas Supreme Court based its reduction of the punitive damages awards on an independent and adequate state law ground. The Arkansas Supreme Court found that as a matter of Arkansas law the $63 million punitive damages awards shocked the conscience of the court and that the awards were excessive as a matter of Arkansas law. The Arkansas Supreme Court also held that the punitive damages awards were grossly excessive as a matter of federal constitutional law. However, given the independent and adequate state law ground for the reduction of the awards that is clearly set forth in the Arkansas Supreme Court's opinion, this Court should decline to review the Arkansas Supreme Court's reduction of the awards. Any opinion rendered by this Court as to the purported error alleged by Plaintiff in the Arkansas Supreme Court's constitutional analysis would constitute an impermissible advisory opinion.

Even if the Arkansas Supreme Court's reduction of the punitive damages awards did not so clearly rest on an independ-

ent and adequate state law ground, the question presented by Plaintiff's cross-petition would not warrant review by this Court. Plaintiff contends that the Arkansas Supreme Court erred in holding that the three *Gore* guideposts should be given "equal weight" and in holding that the third *Gore* guidepost could in itself be a sufficient basis for holding a punitive damages award constitutionally excessive. On the contrary, if any one of the three *Gore* guideposts indicates that an award is grossly disproportionate or that a defendant did not have the constitutionally required fair notice of the severity of the punishment his conduct might incur, the award must, as a matter of due process, be reduced. In this case, the Arkansas Supreme Court's analysis of the civil penalties guidepost correctly led the court to conclude that the defendants had not received fair notice of the severity of the $63 million punitive damages awards. As a constitutional matter, that conclusion mandated the reduction of the award. Moreover, Plaintiff's additional contention that the Arkansas Supreme Court erroneously disregarded the criminal penalties Plaintiff claims would be applicable to the defendants' conduct under Arkansas law is not included in Plaintiff's question presented and does not raise a substantial constitutional question. To the extent the Arkansas Supreme Court found that under the third *Gore* guidepost defendants did not have fair notice that a $63 million sanction could be imposed in this case, the court was correct in reducing the awards.

As shown in the defendants' petition for certiorari and reply brief, the Arkansas Supreme Court did in fact commit constitutional error, including in its application of the third *Gore* guidepost. The Arkansas Supreme Court's constitutional errors, however, implicate only the issue of whether the $21 million punitive damages award must be further reduced to comply with due process. *See* Petition for Certiorari at 7-29; Petitioners' Reply Brief at 1-10.

For these reasons and those set forth below, Plaintiff's conditional cross-petition should be denied.

ARGUMENT

I. PLAINTIFF'S CROSS-PETITION SHOULD BE DENIED BECAUSE THE ARKANSAS SUPREME COURT'S REDUCTION OF THE PUNITIVE DAMAGES AWARDS WAS BASED UPON AN ADEQUATE AND INDEPENDENT STATE LAW GROUND

This Court "from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945). As this Court has stated:

> This Court's only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

Id.; *see also Coleman v. Thompson*, 501 U.S. 722, 729 (1991) ("This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment."); *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 566 (1977) (same).

In the present case, the Arkansas Supreme Court, in a section of its opinion entitled "Arkansas common law," analyzed the $63 million punitive damages awards for excessiveness under Arkansas law. Pet. App. at 16a-18a. The court set forth in detail the Arkansas standards for determining excessiveness of a punitive damages award. *Id.* at 16a. The Arkansas standards detailed by the court do not duplicate the federal constitutional standard, but rather require the court to determine "whether the verdict is so great as to shock the conscience of [the] court or to demonstrate passion or prejudice on the part of the trier of fact." *Id.* The court concluded that the $63 million punitive damages awards "shock[ed] the conscience of [the] court as a civil penalty" and were clearly excessive under Arkansas law. *Id.* at 18a. The Arkansas Supreme Court also independently concluded that the $63 mil-

lion punitive damages awards were excessive under federal constitutional law. Summing up, the court held that both "under Arkansas law and under the three *Gore* factors, $63 million was a grossly excessive award and one that could not have been anticipated by the appellants." *Id.* at 25a.

In short, the Arkansas Supreme Court's opinion makes clear that its reduction of the punitive awards to $21 million is based upon an adequate and independent state law ground. Accordingly, plaintiff's conditional cross-petition challenging that reduction should be denied.

II. PLAINTIFF'S CROSS-PETITION SHOULD BE DENIED BECAUSE THE ARKANSAS SUPREME COURT WAS CORRECT IN HOLDING UNDER THE THIRD *GORE* GUIDEPOST THAT DEFENDANTS DID NOT HAVE FAIR NOTICE OF THE SEVERITY OF THE $63 MILLION PUNITIVE DAMAGES AWARDS

In asserting that the Arkansas Supreme Court erred in stating that the three *Gore* guideposts should be given "equal weight," Plaintiff essentially argues that the reprehensibility guidepost should be allowed to trump the other guideposts. In other words, Plaintiff's contention is that if a defendant's conduct can be portrayed as sufficiently reprehensible, the ratio and civil penalties guideposts may be ignored even if they indicate that the punitive damages award is excessive or that the defendant did not receive fair notice of the severity of the punishment he might face. Plaintiff's view of the relationship of the three guideposts under this Court's punitive damages jurisprudence is simply wrong.

Plaintiff's argument is based on an incorrect interpretation of this Court's statement that the degree of reprehensibility of a defendant's conduct is the "'most important indicium'" of the reasonableness of a punitive damages award. *See Campbell*, 123 S. Ct. at 1521 (quoting *Gore*, 517 U.S. at 575). This Court's decision in *Campbell* makes clear that reprehensibility is the most important guidepost because reprehensibility is a necessary precondition to *any* punitive damages award. Thus, while "[t]he existence of any one of [the] factors" showing reprehensibility "may not be sufficient to sustain a punitive damages award," the "absence of all of them renders *any* award suspect." *Id.* (emphasis added). Moreover, "punitive

damages should *only* be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." *Id.* (emphasis added) This Court has not stated or even suggested that the reprehensibility guidepost may trump the other two guideposts or provide a basis for sustaining a punitive damages award that one or both of the other two guideposts indicate is excessive. Rather, to the extent the degree of reprehensibility of a defendant's conduct bears on the *amount* of punitive damages, the reprehensibility guidepost affects whether a higher or lower amount is permissible within the boundaries set by the guideposts of ratio and civil penalties.

The three *Gore* guideposts function together to aid the courts in determining whether a defendant received the constitutionally required "fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *Gore*, 517 U.S. at 574. In some cases, all three guideposts in combination may indicate that a punitive damages award is excessive because the defendant lacked fair notice of the size of the award. In other cases, one guidepost may indicate that a defendant lacked fair notice. If even one guidepost compels the conclusion that a defendant lacked fair notice of the size of the punitive award rendered against him, due process requires reduction of the award. Thus, the three guideposts are entitled to equal weight in the sense that even if two appear to support a punitive award, they should not outweigh the third if it indicates that the defendant lacked fair notice or that the award was out of proportion to the harm to the plaintiff. Accordingly, the reprehensibility of a defendant's conduct cannot sustain an award if either or both of the other guideposts show that the award is unconstitutional.

In the present case, the Arkansas Supreme Court's analysis of the third *Gore* guidepost led the court to conclude correctly that defendants did not have the fair notice required by due process that $63 million in punitive damages might be imposed upon them. In applying the third *Gore* guidepost, the Arkansas Supreme Court analyzed the potentially relevant civil penalties provided for by Arkansas law. The court found that the punitive damages award was "substantially greater

than the statutory penalties set forth in the Arkansas Code" for neglect of a patient in a long term care facility, namely "$10,000 for each violation judicially found to have occurred or not more than $50,000 for the death of an adult resulting from a single violation." Pet. App. at 23a. The court noted that the "record in this case does not establish the specific number of civil violations committed against Mrs. Sauer." *Id.* The court also noted criminal sanctions potentially available for criminal neglect of such a patient. *Id.*

In addition, under its analysis of the third *Gore* guidepost, the Arkansas Supreme Court looked to amounts of punitive damages awards that it and the Arkansas Court of Appeals had upheld in earlier cases. The Arkansas Supreme Court stated:

> The highest punitive-damages award affirmed by this court is $3 million. *See Airco, Inc. v. Simmons First Nat. Bank*, 276 Ark. 486, 638 S.W.2d 660 (1982). The highest punitive damage award affirmed by our court of appeals on appeal is $4 million. *See Arrow Int'l, Inc. v. Sparks*, 81 Ark. App. ___, 98 S.W.3d 48 (2003). We conclude, as we did with compensatory damages, that the punitive damages awarded, while not the determinative factor, is instructive. Under our analysis the third criterion in *Gore* has not been met.

Pet. App. at 25a.

Furthermore, contrary to Plaintiffs' contentions, the Arkansas Supreme Court did not err in failing to give more weight to potential criminal penalties – an issue, moreover, that is not included with the question presented in Plaintiff's cross-petition. Plaintiff argues here that "each meal that [Mrs. Sauer] missed and each occasion when she should have been given water but was not could be deemed a separate Class D felony and could have resulted in a separate term of imprisonment." Cross-Petition at 13. Just as it did before the Arkansas Supreme Court, Plaintiff now in its cross-petition entirely fails to support this contention with any authority showing that the Arkansas statute has *ever* been applied in this fashion. Plaintiff's contention that the defendants' conduct toward Mrs. Sauer should be regarded as constituting 6,300 violations is precisely the kind of speculation that this Court rejected in

Campbell as an insufficient basis for upholding a punitive award. *See Campbell*, 123 S. Ct. at 1526 (stating that the "remote possibility of a criminal sanction does not automatically sustain a punitive damages award" and rejecting the Utah Supreme Court's "speculat[ion] about the loss of State Farm's business license, the disgorgement of profits, and possible imprisonment").

Moreover, the cross-petition should be denied even if this Court were to believe that the Arkansas Supreme Court was inaccurate in its statement that the three *Gore* guideposts must be given equal weight. Any such purported error would not change the fact that neither the $63 million punitive awards imposed by the jury in this case nor the remitted $21 million award, imposed jointly and severally on the three defendants, is permissible as a matter of due process. Thus, there was no error in the Arkansas Supreme Court's conclusion that the punitive award needed to be reduced. Rather, as shown in the defendants' petition for certiorari and reply brief, the Arkansas Supreme Court's errors consisted in not reducing the award sufficiently, not giving consideration to the defendants' financial conditions, not applying a separate *Gore* analysis to the conduct of each of the three defendants, and imposing joint and several liability for the punitive award. *See* Petition for Certiorari at 7-29; Petitioners' Reply Brief at 1-10.

Accordingly, the question presented in Plaintiff's cross-petition does not merit review by this Court.

CONCLUSION

Plaintiff's conditional cross-petition for a writ of certiorari should be denied.

Respectfully Submitted,

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